

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-7465

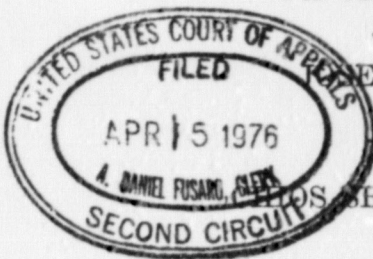
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ORIGINAL

To be argued by:
JAMES M. KENNY

United States Court of Appeals

FOR THE SECOND CIRCUIT



— FERNANDEZ,

Plaintiff,

—against—

CHIOS SHIPPING CO., LTD.,

Defendant and Third-Party
Plaintiff-Appellee,

—against—

MAHER STEVEDORING COMPANY, INC.

and STATES MARINE LINES, INC.,

Third-Party
Defendants-Appellants.

CHIOS SHIPPING CO., LTD.,

Fourth-Party Plaintiff,

—against—

CASTLE & COOK, INC., DOLE CORP. and

CASTLE & COOK FOODS CORPORATION,

Fourth-Party
Defendants-Appellants.

**BRIEF ON BEHALF OF THIRD-PARTY DEFENDANT-
APPELLANT, MAHER STEVEDORING CO., INC.**

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3

TABLE OF CONTENTS

	PAGE
ISSUES PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
FACTS	4
POINT I—The Trial Court should have entered, as a matter of law, judgment in favor of the Stevedore with regard to the Shipowner's and Charterer's indemnity actions on the undisputed facts	6
POINT II—The court applied an erroneous standard of law to the question of the obligation of Stevedore to indemnify Shipowner	12
POINT III—The Trial Court committed procedural errors which amounted to prejudicial error in the trial of the action and the judgment below does not finally determine the liabilities of Stevedore and Shipper	14
CONCLUSION	16

Cases Cited

Armstrong v. Commerce Tankers Corp., 423 F.2d 957 (2 Cir. 1970)	6
Calderola v. Cunard Steamship Co. Ltd., 279 F.2d 475 (2 Cir. 1960).....	12, 13
Cia Maritima del Nervion v. James J. Flanagan Ship Corp., 308 F.2d 120 (5 Cir. 1962).....	13
Cooper Stevedoring v. Kopke, 417 U.S. 106 (1974), 94 S. Ct. 2174, 40 L. Ed. 2d 694.....	15

	PAGE
D'Amico v. Lloyd Brasileiro Patrimonie Nationale, 354 F.2d 33 (2 Cir. 1965).....	7
Demsey & Associates, Inc. v. SS Sea Star, 500 F.2d 409 (2 Cir. 1974).....	4
Ferrigno v. Ocean Transport Ltd., 201 F.Supp. 173 (S.D.N.Y. 1961)	13
Hardy v. United States of America v. Ryan Stevedoring Co., 322 F.Supp. 660 (E.D.N.C. 1970).....	8
In Re Seaboard Shipping Corporation, 449 F.2d 132 (2 Cir. 1971).....	15
Inatyuk v. Tramp Chartering Corp., 250 F.2d 198 (2 Cir. 1957).....	7, 13
Maillard v. American Export Isbrandtsen Lines, Inc., 406 F.2d 322 (2 Cir. 1959).....	10
Mortensen v. A/S Glittere, 348 F.2d 383 (2 Cir. 1965)	10
Orlando v. Prudential Steamship Corp., 313 F.2d 822 (2 Cir. 1963).....	9
Pacific Far East Line, Inc. v. Jones Stevedoring Co., 346 F.2d 642 (9 Cir. 1965).....	9, 10
Parker v. The SS Dorothe Olendorff, 483 F.2d 375 (5 Cir. 1973).....	9
Scin dia Steam Navigation Co. v. Moon Engineering Company, 379 F.2d 928 (4 Cir. 1967).....	8
Scott v. SS Ciudad de Ibague, 426 F.2d 1105 (5 Cir. 1970)	7, 8
Swain v. Boeing Airplane Corp., 337 F.2d 940 (2 Cir. 1964)	14
Taylor v. National Trailer Convoy, Inc., 433 F.2d 569 (10 Cir. 1970).....	14

TABLE OF CONTENTS

iii

	PAGE
United States v. Reliable Transfer Co., 421 U.S. 397 (1975), — S. Ct. —, — L. Ed. 2d —	15
Vaccaro v. Alcoa Steamship Co., 405 F.2d 1133 (2 Cir. 1968)	10
Waterman Steamship Corp. v. Brady-Hamilton Stevedore Co., 243 F. Supp. 298 (E.D. Ore. 1965)....	9

Rule Cited

Federal Rules of Civil Procedure:

51	14
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Regulation Cited

Safety and Health Regulations for Longshoring	6
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United States Court of Appeals

FOR THE SECOND CIRCUIT

JOSE FERNANDEZ,

Plaintiff,

—against—

CHIOS SHIPPING CO., LTD.,

*Defendant and Third-Party
Plaintiff-Appellee,*

—against—

MAHER STEVEDORING COMPANY, INC.

and STATES MARINE LINES, INC.,

*Third-Party
Defendants-Appellants.*

CHIOS SHIPPING CO., LTD.,

Fourth-Party Plaintiff,

—against—

CASTLE & COOK, INC., DOLE CORP. and

CASTLE & COOK FOODS CORPORATION,

*Fourth-Party
Defendants-Appellants.*

**BRIEF ON BEHALF OF THIRD-PARTY DEFENDANT-
APPELLANT, MAHER STEVEDORING CO., INC.**

Issues Presented for Review

1. Did the District Court err in failing to find, as a matter of law and upon uncontradicted testimony, that the Shipowner and Charterer were not entitled to indemnification from the Stevedore.

2. Did the District Court err in applying an erroneous standard to the question of the Shipowner's and Charterer's indemnity from the Stevedore.

3. Did the procedural errors of the District Court result in prejudicial error in the trial of the action and is the District Court judgment sufficient to determine the Stevedore's and Shipper's respective liabilities.

Statement of the Case

This is an appeal from a judgment after trial by jury. Judgment was entered after decisions on post-trial motions by Motley, J., dated January 15, 1976 and August 5, 1975 (10a-32a).*

The Plaintiff, Jose Fernandez (hereinafter called "Plaintiff"), brought suit against the defendant, Chios Shipping Co., Ltd. (hereinafter called "Shipowner") for injuries sustained on September 1, 1968 while he was working as a longshoreman aboard the CHIOS, a vessel owned by Shipowner and chartered to States Marine Lines, Inc. (hereinafter called "Charterer"). Shipowner, in turn, impleaded Maher Stevedoring Company, Inc. (hereinafter called "Stevedore"), Charterer and Castle & Cook, Inc., Dole Corp. and Castle & Cook Foods Corporation** (hereinafter collectively called "Shipper") seeking

* Numerical references followed by the letter "a" are references to pages in the Joint Appendix.

** The claim of Shipowner against Shipper is improperly designated as a fourth-party complaint. It should be designated as a third-party complaint and Shipowner and Shipper designated as third-party plaintiff and third-party defendants respectively.

indemnification as to any damages recovered by Plaintiff against Shipowner (along with counsel fees and expenses). Stevedore, Charterer and Shipper, either by pleadings or amendments thereto in the pre-trial order, cross-claimed against each other.

The action was tried to a jury before Motley, J., on June 2 through June 6, 1975. Plaintiff's complaint asserted causes of action for negligence and unseaworthiness. The negligence claim was dismissed by the court. The jury returned a verdict finding the CHIOS unseaworthy, that the unseaworthiness was the proximate cause of Plaintiff's injury, that Plaintiff was entitled to damages of \$90,200* and Plaintiff was not contributorily negligent. The issues presented by the impleading complaints and cross-claims were then given to the jury for resolution. The jury returned a second verdict finding that the Stevedore had breached its warranty of workmanlike performance, thus obligating it to indemnify the Shipowner for damages to the Plaintiff. In addition, the jury found that the Shipper was also liable in indemnity for the damages awarded to the Plaintiff from the Shipowner.

On January 15, 1976, Judge Motley rendered a memorandum decision setting forth the liability of the Shipowner, Stevedore, Charterer and Shipper *inter se*. Judge Motley determined that the Shipowner was entitled to indemnity from the Charterer, Stevedore and Shipper and furthermore, that the Charterer was entitled to indemnity from the Stevedore and Shipper. Judgment was entered against the Stevedore and Shipper in favor of

* Shipowner settled with Plaintiff for the sum of \$75,000. Plaintiff is not directly involved in this proceeding. Stevedore did not assent to this settlement. By settling, Shipowner forgoes an appeal from the jury award of \$32,300 for future pain and suffering which was caused by Plaintiff's attorney reading to the jury a text, not in evidence, description describing pain (428a-430a).

the Shipowner and Charterer for indemnity and counsel fees.* Stevedore appeals from this judgment (8a-9a).

Facts

On September 1, 1968, the SS CHIOS was discharging from the No. 3 lower hold a cargo of "pre-palletized" cartons of pineapples at Port Newark, New Jersey (43a-48a). The "pre-palletized" cartons were constructed by the Shipper at an inland location in the Republic of the Philippines (416a). The cargo had been laden on board the vessel at Dadiangas, Republic of Philippines (219a). During discharge, each pallet of cargo was individually hoisted from the hold by the cargo fall (50a). The pallets stowed in the square of the hatch were "pre-slung" in the Philippines and lifted from the hold without holdmen rigging bridles to them (119a). After the square of the hatch was cleared of pallets, a forklift was lowered into the hold (63a, 119a). The forklift was used to bring the pallets from their places in stow in the wings of the hatch to the square of the hatch. In the square of the hatch, the holdmen would attach the bridles to the pallet. The bridles, after being placed on the pallet, would be hooked to the cargo fall and the pallet hoisted from the hold. The Stevedore began to work this hold at 8 A.M. (44a). Plaintiff was injured at 12:30 P.M. (54a) as a result of being struck by a "pre-palletized" carton or cartons of pineapples which fell on him when the pallet broke apart without warning (77a). The pallet was about 8 to 10 feet off the deck when it broke (67a, 75a). No other pallet

*The judgment provides for an award of counsel fees to both Shipowner and Charterer. Surely, Stevedore can only be liable for the attorney's fees of one of the parties. The award of counsel fees is governed by equitable doctrines. *Demsey & Associates, Inc. v. SS Sea Star*, 500 F.2d 409, 411 (2 Cir. 1974).

had failed before this incident (76a). The pallet broke apart either, according to the witness Mr. Romero, a holdman, when it was being raised out of the No. 3 hold from the square of the hatch by the cargo fall (55a, 113a) or, according to the witness Mr. Perry, a forklift operator, when it was on his forklift after having been lifted from its place in stow and was being brought to the square of the No. 3 hatch (118a-140a). Romero (75a) testified that the discharge was performed in the usual, customary manner. Plaintiff testified that the unloading operation was being accomplished "correctly" (300a). Plaintiff did not complain to his hatch boss or any other stevedore employee regarding any unsafe conditions in the hold (301a). There was no apparent defect in the pallet that broke under its own weight (112a 222a).

Edward Ponek, the Safety Director of Stevedore, testified at the trial on behalf of the Shipowner (243a-276a). Significantly, no questions were addressed to Mr. Ponek regarding supervision and direction of employees by the stevedore in discharging pre-palletized cartons from a vessel. Likewise, no testimony was adduced regarding the duties of the Stevedore in providing for the safety of its personnel in the lower hold when such a cargo was being discharged. Furthermore, no testimony from any stevedoring expert was introduced at the trial on these issues by any of the parties who sought indemnity from Stevedore.

The jury found in answers to special questions that the Stevedore had breached its warranty of workmanlike performance because of failure to properly supervise and direct its employees in the unloading operation and failure to provide for the safety of its employees (13a-15a). The jury also found, in response to more specific interrogatories, that the Stevedore properly un-

loaded the pallet and did not violate the Safety and Health Regulations for Longshoring. The jury further found that the pallet broke apart as the result of a latent or hidden defect in the pallet.

POINT I

The Trial Court should have entered, as a matter of law, judgment in favor of the Stevedore with regard to the Shipowner's and Charterer's indemnity actions on the undisputed facts.

The Stevedore appeals from the Trial Court's denial of its motions for a directed verdict and judgment *non obstante veredicto* (n.o.v.)

The Stevedore asserts that, as a matter of law, the third-party indemnity complaints of the Shipowner and Charterer should have been dismissed. The Stevedore submits further that the evidence adduced at the trial meets the test set forth in *Armstrong v. Commerce Tankers Corp.*, 423 F.2d 957, 959 (2 Cir. 1970), for judgment n.o.v. A judgment dismissing all claims against the Stevedore should have been rendered by the Trial Court because there is a complete lack of probative evidence to support a contrary verdict and/or the evidence is so strongly in favor of the dismissal of the indemnity claims against the Stevedore that reasonable and fair-minded men could not arrive at a contrary verdict.

The sole basis for liability on the part of the Stevedore is the jury's affirmative answer to special question No. 1 submitted on the third-party case. This affirmative answer concerns the alleged failure by Stevedore to properly supervise and provide for the safety of its em-

ployees. The only evidence on the supervision issue is the fact that Plaintiff testified that he did not see his hatch boss in the hold immediately prior to the accident and he did not see the signal man on deck. There is no testimony that the presence of the hatch boss or the signal man could have prevented the accident. Furthermore, there was no expert testimony introduced to establish in what manner Stevedore failed to provide for the safety of its employees in the hold. There is a complete absence of any evidence to establish that Stevedore in any way proximately caused this accident. The square of the hatch of No. 3 lower was a confined space since the hold was stowed with pineapple pallets (298a, 299a). This was a normal condition and the discharging was usual (75a) and correct (300a).

The jury found that the pallet was latently defective. An effect of this finding is the conclusion that the defective pallet could not have been discerned by a reasonably cursory inspection. *Inatyuk v. Tramp Chartering Corp.*, 250 F.2d 198, 201 (2 Cir. 1957). The Stevedore has been held liable without fault. There was no apparent defect in the "pre-palletized" cartons of pineapples which broke without warning (112a, 221a, 223a). The Stevedore is not responsible for latent defects not discoverable by a reasonable, if only a cursory, inspection (300a). *D'Amico v. Lloyd Brasileiro Patrimonial Nacional*, 354 F.2d 33 (2 Cir. 1965).

The facts in the instant case bear a striking resemblance to the facts in a decision rendered by the Fifth Circuit in *Scott v. SS Ciudad de Ibaque*, 426 F.2d 1105 (5 Cir. 1970). In *Scott*, sacks of coffee fell upon the plaintiff due to a latent defect in stowage. Scott and another longshoreman were removing the sacks of coffee from one of the tween deck hatches of the ship. There was no apparent defect in the stowage of the sacks and the unloading pro-

cedures used by the longshoremen were customary and ordinary. Scott was not contributorily negligent. The court held, at 426 F.2d 1110, that "the latent defect in stowage which caused the injury was a latent defect of which the stevedore's employees were not the creators and of which they had no knowledge. *To cast the stevedore in liability in such a fact situation would be an exceedingly harsh result.*" (emphasis added). It is submitted that such a harsh result is present in the judgment of indemnity entered below against the Stevedore and should be reversed.

The issue of the failure of a stevedore to supervise its employees and failure to provide for the safety of its employees was squarely before the court in *Scindia Steam Navigation Co. v. Moon Engineering Company*, 379 F.2d 928 (4 Cir. 1967). The court, in considering the implied warranty of workmanlike performance, held that where the independent contractor (Stevedore) had no knowledge that an unsafe condition existed there was no basis to find that the independent contractor rendered a substandard performance in failing to properly supervise work and use precautions for the safety of its employees. The Stevedore in the instant action had no knowledge of the defect in the pallet. The record is devoid of evidence of complaints by the Stevedore's employees of unsafe conditions in the hold. The warranty of workmanlike performance has not been breached.

The Stevedore submits that even if the hatch boss and the signal man were not near the No. 3 hatch when the pallet split, and assuming, *arguendo*, that their absence was negligence on the part of the Stevedore, this negligence is not enough to entitle the Shipowner and Charterer to indemnity. *Hardy v. United States of America v. Ryan Stevedoring Co.*, 322 F.Supp. 660, 664 (E.D.N.C. 1970). The issue, it is submitted, is whether the Stevedore

by the exercise of reasonable care could have discovered the presence of the defect in the pallet. This question has been answered in the negative by the jury due to the finding that the defect was latent. This finding established that an adequate inspection of the vessel and adequate supervision of the work could not have discovered the defect and prevented the accident. The failure of supervision, because of the alleged absence of the hatch boss or signal man, as a matter of law, is not a proximate cause of the accident. A third-party action for indemnity under the Ryan doctrine must flow from negligence or a breach of the stevedore's warranty of workmanlike performance. *Parker v. The SS Dorothea Olendorff*, 483 F. 2d 375, 381, 382 (5 Cir. 1973). It is submitted that the required proximate causation is not present and, as a matter of law, the judgment against Stevedore should be reversed.

The alleged negligence and breach of warranty in this action is that the Stevedore failed to properly supervise and provide for the safety of its personnel. The Stevedore had no knowledge either constructive or actual that Plaintiff would not have a reasonably safe place to work and perform his job as a holdman. The discharging had proceeded for four hours without incident. In the absence of any notice to the contrary, the Stevedore is permitted to assume that its personnel have a reasonably safe place to work. *Waterman Steamship Corp. v. Brady-Hamilton Stevedore Co.*, 243 F. Supp. 298 (E.D.Ore. 1965); *Orlando v. Prudential Steamship Corp.*, 313 F. 2d 822 (2 Cir. 1963). Shipowner and Charterer have failed to prove that the Stevedore knew, or should have known, that the vessel's No. 3 lower hold was an unsafe place to work. The burden of proof with regard to all issues in the third-party action is on the vessel. *Pacific Far East Line, Inc. v. Jones Stevedoring Co.*, 346 F. 2d 642, 645 (9 Cir. 1965). A failure to sustain this burden should

have impelled the Trial Court to dismiss the third-party action as a matter of law. *Maillard v. American Export Isbrandtsen Lines, Inc.*, 406 F.2d 322 (2 Cir. 1959).

The jury found that Plaintiff was not contributorily negligent. Shipowner claimed that Plaintiff was negligent in standing near or under the defective pallet.

We do not dispute that Plaintiff himself, an employee of Stevedore, may be the vehicle by which fault can be imputed to his employer. *Mortensen v. A/S Glittere*, 348 F.2d 383 (2 Cir. 1965). But the converse is true as well; a plaintiff judged to be blameless in the face of plain danger stands as proof that there was no such apparent danger. This point is strongly made by the court in *Vaccaro v. Alcoa Steamship Co.*, 405 F.2d 1133 (2 Cir. 1968). In *Vaccaro*, the cause of plaintiff's injury was determined to be an inadequately secured bench. The shipowner claimed, as here on the Plaintiff's direct case, that the plaintiff himself had knowledge of a dangerous condition and that such knowledge must be imputed to his employer.

The Second Circuit put to rest the argument that a condition of danger was known to plaintiff (and hence to stevedore) by pointing out that there was an express finding that plaintiff was not guilty of contributory negligence.

"In the case at bar appellant only established that American knew of the bench's existence. In addition to this the shipowner had to show American's knowledge that the bench, in the place where it was, created an unsafe condition. 405 F.2d 1138.

In this case, Shipowner arguably established that the space in which the men were working was "confined"; not that the Stevedore knew that the existence of such "confined" space created an unsafe condition.

Moreover, the three parties adverse to Stevedore had every opportunity to present testimony to prove that the "confined" space was unsafe or other than customary. No such testimony was offered. In fact, the testimony on the issue is to the contrary; that the discharge was normal.

In summary, the record is absolutely barren of evidence to support a verdict for the Shipowner and Charterer based upon the negligence and breach of warranty of Stevedore. Also, the Shipowner and Charterer, the parties with the burden of proof, have failed to establish, as a matter of law, that the Stevedore was negligent and/or breached its warranty of workmanlike performance and this negligence or breach of duty was a proximate cause of the accident.

POINT II

The court applied an erroneous standard of law to the question the obligation of Stevedore to indemnify Shipowner.

The result of the verdict of the jury and the denial by the Trial Court of Stevedore's motion for judgment n.o.v. is that Stevedore must insure the Shipowner and Charterer against the legal consequences of the injury to Plaintiff aboard Shipowner's vessel regardless of cause. The result of this decision is that Stevedore must insure that its employees working in a vessel's lower hold must be provided "sanctuary" to retreat (31a) to should the vessel's unseaworthiness, in a split second (120a), cause an unsafe condition in the hold.

Preliminarily, it should be stated that Stevedore is, in no sense, the insurer of Shipowner and Charterer as to accident caused by the unseaworthiness of the vessel.

Judge Lumbard, of this court wrote, in *Calderola v. Cunard Steamship Co. Ltd.*, 279 F.2d 475, 478 (2 Cir. 1960):

"... Under this agreement Clark was not required to act as an insurer against any loss by Cunard or to discover and correct every hidden danger. Its duty was only to perform its services with 'reasonable safety'. *Weyerhaeuser, S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958), 78 S.Ct. 438, 21 L. Ed. 2d 491; *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), 76 S. Ct. 232, 100 L. Ed. 133."

The Stevedore submits that the case at bar represents a classic fact pattern requiring the denial of indemnifica-

tion. The undisputed testimony reflects that Stevedore had absolutely no knowledge that the pallet was defective or that conditions in the No. 3 hold were allegedly unsafe. Stevedore had no legal duty or responsibility to supervise, direct and provide for the safety of its employees in the vessel's No. 3 lower hold in anticipation that one of the Shipper's pallets of pineapples was latently defective. To be held to a level of performance requiring the Stevedore to provide "sanctuary" from objects which fall, without warning, in a split second, imposes insurer's liability on the Stevedore. The law is clear that Stevedore's obligations, such as they are, are triggered only with respect to dangers apparent upon a cursory inspection. *Ignatyuk v. Tramp Chartering Corp.*, supra; *Calderola v. Cunard Steamship Co.*, supra; *Ferrigno v. Ocean Transport Ltd.*, 201 F. Supp. 173 (S.D.N.Y. 1961); *Cia Maritima del Nervion v. James J. Flanagan Ship Corp.*, 308 F.2d 120 (5 Cir. 1962).

In sum, the decision below imposes a standard of care on the Stevedore which places an impossible burden on the Stevedore. A stevedore charged with the duty of providing "sanctuary" to retreat from latently defective pallets being discharged from a vessel's lower hold could never work in such a confined area as the square of the hatch without automatically breaching the implied warranty of workmanlike performance.

POINT III

The Trial Court committed procedural errors which amounted to prejudicial error in the trial of the action and the judgment below does not finally determine the liabilities of Stevedore and Shipper.

The trial judge failed to give the attorneys for the parties opportunity to make objections to the court's charge and special questions on the third-party case prior to the jury beginning its deliberations. Opportunity was not given to object to the court's charge until approximately three hours after deliberations had begun (506a-507a). Any objection to instructions must be made after the court has given the instructions and before the jury retires to deliberate. *Taylor v. National Trailer Convoy, Inc.*, 433 F.2d 569 (10 Cir. 1970); *Swain v. Boeing Airplane Corp.*, 337 F.2d 940 (2 Cir. 1964). The Trial Court has clearly ignored the provisions of Federal Rules of Civil Procedure, Rule 51. The Stevedore was prejudiced in that opportunity was not given to object to special question No. 1 (33a-34a). Special question No. 1 imposed upon the Stevedore an obligation which was error as a matter of law. (See Points I and Points II, *supra*).

In addition to the procedural error regarding Rule 51, the trial judge failed to place before the jury the issue of the Charterer's liability. Even though this was the case, the Charterer was permitted a summation. The Stevedore was prejudiced in that the vessel's interests, the Shipowner and Charterer, were given two opportunities to review the evidence and argue for indemnity from the Stevedore. This was the case, even though the Charterer's interests were never placed in jeopardy by the jury's verdict.

A third prejudicial error alleged by the Stevedore which was committed by the Trial Court was the failure of the interrogatories addressed to the jury on the third-party claim to include an option for a jury finding that the third-party plaintiff, the Shipowner, did not meet its burden of proof (33a-36a). This option was given to the jury on the direct case of the Plaintiff against the Shipowner (39a). It is submitted that this gave the jury the impression that indemnity had to be granted.

The Trial Court held Stevedore and Shipper jointly liable (27a) to Shipowner and Charterer; the Stevedore for breach of warranty; the Shipper apparently for negligence. By definition, Stevedore, as indemnitor is liable for full damages. Shipper is likewise liable for full damages unless entitled to contribution from a co-negligent party. Stevedore is not a co-negligent party as found by the jury but a party which breached its warranty and is contractually liable. Also, Stevedore as Plaintiff's employer is protected from suits for contribution. *Cooper Stevedoring v. Kokpe*, 417 U.S. 106 (1974), 94 S. Ct. 2174, 40 L. Ed. 2d 694. How are the damages to be apportioned? *In Re Seaboard Shipping Corporation*, 449 F.2d 132 (2 Cir. 1971), held that a finding of joint liability was tantamount to mutual fault. The court equally divided the damages based upon the ancient maritime doctrine that mutual wrongdoers shall share damages. This rule is now dead. *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), — S. Ct. —, — L. Ed. 2d —. How are the damages to be apportioned in this case?

CONCLUSION

So much of the judgment below as finds Stevedore liable to indemnify Shipowner and Charterer is erroneous and should be vacated and judgment should be entered on behalf of the Stevedore dismissing the third-party complaints against it.

Respectfully submitted,

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Appellant Maher Stevedoring Com-
pany, Inc.*
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Of Counsel

Jose Fernandez
Plaintiff
against

Chios Shipping Co. Inc.,
Defendant and Third Party Plaintiff-Appellee

Maheer Stevedoring Company Inc. and States Marine
Lines Inc.,
against

Third Party Defendants-Appellants
Chios Shipping Co. Inc.,
Fourth Party Plaintiff-Appellee

Castle & Cook Inc., Dole Corp. and Castle and Cook
Foods Corporation

Fourth Party Defendants-Appellants
On Appeal from the United States District Court
for the Southern District of New York

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

Raymond J. Braddick, agent for McHugh Heckman Smith &
deposes and says that he is over the age of 21 years and resides at
Levittown, New York

That on the 15th. day of April, 1976

he served the annexed Third Party Defendant-Appellant's Brief upon

Leonard Esqs.

being duly sworn,

1. McHugh, Heckman Smith & Leonard Esqs.

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Attorneys for Third Party Defendant-Appellant
States Marine Lines Inc.,
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New York, New York

in this action, by delivering to and leaving with said attorneys

three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons
mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 15th.

day of April, 1976

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705

Qualified in Delaware County
Commission Expires March 30, 1977